THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JAN. 6, 00
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Congoleum Corporation

Serial No. 74/586,885

Trebor Lloyd of Amster, Rothstein & Ebenstein for Congoleum Corporation.

Andrew A. Roppel, Trademark Examining Attorney, Law Office 109 (Deborah Cohn, Managing Attorney).

Before Simms, Cissel and Seeherman, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Congoleum Corporation (applicant), a Delaware corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the asserted mark shown below for plastic floor covering having a water

resistant, smooth or embossed service. The Examining

Attorney has made final a requirement for specimens which

show use of the asserted mark as a trademark for the goods

identified in the statement of use and in the application.

Applicant has appealed and briefs have been filed. No oral

argument was requested.

We affirm.

It is the Examining Attorney's position that the specimens of record, product guides distributed with applicant's goods, and other exhibits which applicant has made of record (portions of a product catalogue), do not show use of the asserted mark as a trademark, but merely as a term which identifies an installation system or a choice of installation methods. For example, the Examining Attorney points to the use of the mark "Your Choice" on the specimens of record, as shown below.

¹ Application Serial No. 74/586,885, filed October 18, 1994, based upon allegations of a bona fide intention to use the mark in commerce. After the Examining Attorney approved this mark for publication, applicant filed a statement of use asserting first use and first use in commerce since February 8, 1995.

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The Examining Attorney also points to the following uses of the asserted mark shown in applicant's catalogues.

It is the Examining Attorney's position that the asserted mark is used in connection with a method or procedure by which one may install applicant's flooring and that it identifies a choice of installation methods. Because the Examining Attorney believed that the specimens do not show use of the asserted mark for applicant's goods, the Examining Attorney required that applicant submit substitute specimens which show trademark use.

It is applicant's position, on the other hand, that the asserted mark is used by applicant in connection with its FUTURA plastic floor covering, and that the mark refers to a distinct feature of applicant's goods -- its ease of installation under a variety of procedures that the consumer might choose. Applicant argues, Supplemental Brief, 3:

Applicant contends that YOUR CHOICE, as used on the specimens, creates a commercial impression aside from describing a procedure or method of installation and helps distinguish Applicant's flooring products from others' flooring products. The mark, YOUR CHOICE, has a direct association with the flooring goods specified in the Application and is being used in a way calculated to project to consumers certain goods from a single source or origin...

Further, in its original brief, 3, applicant maintains:

There is no dispute that the slogan YOUR CHOICE refers to some special feature or attribute of the goods or, perhaps, a service related to the goods. This does not make YOUR CHOICE incapable of functioning as an indicator of the source of goods. The mere fact that a slogan, or any other kind of mark, may also refer to a service or process or method related to goods or to some attribute of those goods does not prevent the mark or slogan from functioning as an indicator of the source of those goods.²

While applicant concedes that the asserted mark is secondary in nature to the mark FUTURA, applicant argues that more than one trademark may be used in connection with its goods.

It is well settled that not every word or combination of words which appears on or in connection with a product functions as a trademark. In re Remington Products Inc., 3 USPQ2d 1714, 1715 (TTAB 1987). Also, the fact that a mark

² In a request for reconsideration, applicant sought to amend the description to "advertising and installation services for plastic floor covering," but, after the Examining Attorney disallowed

may appear on the specimens of record does not, by that fact alone, mean that it functions as a trademark. Upon careful consideration of this record, we agree with the Examining Attorney that the asserted mark is not used on the materials of record as a trademark to identify applicant's floor covering, but rather as words which merely impart information that applicant's goods may be installed in a number of ways. Consumers and potential purchasers are likely to view the word FUTURA as applicant's trademark identifying and distinguishing applicant's floor covering, but not the words "Your Choice", as applicant contends.

Decision: The refusal of registration is affirmed.

- R. L. Simms
- R. F. Cissel
- E. J. Seeherman Administrative Trademark Judges, Trademark Trial and Appeal

that amendment, applicant withdrew the proposed amendment in its brief.